IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 121 of 1995.

Reserved on: 24.4.2007.

Date of decision: 3.5.2007.

Devinder Singh & Ors. … Appellants

Versus

Shiv Singh & Ors. … Respondents

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] No.

For the appellant : Mr. Ramakant Sharma, Advocate.

For the respondents: Mr. B.K. Sood vice Mr.K.D. Sood, Advocate, for respondent No. 1.

V.K. Ahuja, J.

This is an appeal filed by the appellants against the judgment and decree of the Court of learned District Judge dated 8.12.1994, vide which the appeal filed by respondent No. 1 as against the appellants and other proforma respondents No. 2 to 4 was allowed and the suit of the plaintiffs was dismissed and judgment and decree of the trial Court dated 16.1.1993 decreeing the suit for prohibitory injunction was set aside.

Briefly stated the facts of the case are that the appellants as plaintiffs filed a suit for permanent injunction as against respondent No. 1 alleging that the plaintiffs had been getting drinking water from the Bouli of Khasra No. 45 in village Diuri since time immemorial and their right is duly recorded in the Wajab-ul-Arj. It was

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

alleged that the plaintiffs have no water source available in village Than and they had been taking water from the disputed Bouli. The plaintiffs also alleged that a resolution was passed by the Gram Panchayat Gulhari in the year 1962 under which a regular water supply scheme for their village from village Diuri was approved and the water scheme was to be implemented for which funds were obtained from the Block. It was further alleged that since then water pipe line was laid and the plaintiffs had been getting water through the said pipe line in village Than. The defendant started interfering with such water supply in the year 1984 and he wanted to remove the pipe for which the defendant was called before the Gram Panchayat and now the defendant is threatening to interfere with such supply of water, hence the suit filed by the plaintiffs.

On merits, the defendant pleaded that the plaintiffs have no right to take water from Khasra No. 45 in village Damoori mentioned as village Diuri since the land is owned and possessed by the defendant and he has exclusive personal right to use such water. The defendant also pleaded that there is government lift irrigation scheme for their village and some other villages which water is used by the plaintiffs and there are two natural sources of water in village Than and the plaintiffs are using such water. It was pleaded that the resolution was passed by the Panchayat for their own benefit since the father of the plaintiff was a member of the Panchayat. The suit was tried by the learned trial Court which decreed the suit. The findings were reversed by the learned first Appellate Court.

I have heard the learned counsel for the parties and have also gone through the record.

The submissions made by the learned counsel for the appellants were that the right of the taking of water from the Bouli was a matter of necessity based upon Wajab-ul-Arj. It was submitted that

the scheme was implemented by the Panchayat and no objections were raised by the defendant who is precluded from raising the objection at a belated stage. It was also submitted that even if the resolution of the Panchayat is ignored, there is sufficient oral as well as documentary evidence to show that there was a scheme and the water was being used by the plaintiff and others. It was also submitted that the learned first Appellate Court had not given any cogent reasons for differing with the judgment of the trial Court though it was required to discuss the evidence in detail and give reasons which were not given and, therefore, the appeal is liable to be accepted.

On the other hand, the learned counsel for respondent No.1 submitted that the reasons have been given by the learned first Appellate Court at the time of allowing of the appeal which may be considered.

To substantiate his plea, that the reasons are required to be given in detail, the learned counsel for the appellant had relied upon the following decision:

The decision in **H.K.N. Swami** Vs. **Irshad Basith (Dead) by LRs., (2005) 10 Supreme Court Cases 243**, shows that the first appeal has to be decided on facts as well as on law. First appellate Court is required to address itself to all the issues and decide the case by giving reasons. It was observed that unfortunately in the instant case the High Court did not record any finding either on facts or law and its order was cryptic and without reasons. Therefore, the case was remanded back to the High Court for decision afresh relying upon an earlier judgment of the Hon'ble Apex Court in Madhukar's case, (2001) 4 Supreme Court Cases 756.

A perusal of the decision in Madhukar's case (supra) shows that it is a detailed decision of the Hon'ble Apex Court of a three Judge Bench and it was clearly laid down that the Court of first appeal must

record its findings only after dealing with all issues of law as well as of fact and discuss the evidence, oral as well as documentary, led by the parties, the Court must give reasons in support of its findings. It was held that the High Court erred in allowing respondent's first appeal without even considering the grounds on which the trial Court had dismissed the suit and without discussing the evidence on record.

A perusal of the record shows that the appeal was admitted by this Court on 5.8.1996. However, no substantial questions of law were formulated by the Hon'ble Judge dealing with the file which was necessary and hence the substantial questions of law framed at page No.8 are held to be involved in the present appeal, which are as under:

1. Whether the learned lower Appellate Court has misread the oral evidence led by the parties as submitted in the grounds of Appeal?
2. Whether the water being a mineral and thus belonging to the State, any person in whose land a source of water is situate can claim any exclusive right to the user of such water and deny the user thereto other persons?
3. Whether the person can have a right to interfere with the supply of the drinking water being supplied to other villagers by a scheme sanctioned and approved and executed by the Block Department through the Gram Panchayat concerned.

Coming to the evidence led on these substantial questions of law, there are findings of the learned trial Court in which the learned trial Court had referred to the evidence of the plaintiff that they had been using the water of Bouli in village Damoori and the water was taken to their village Than through pipe line in the year 1964 by the Gram Panchayat. The plaintiffs witnesses admitted that there are two other Bouli in village Than. It was observed that the water dries up

during the summer season. There was evidence led from the office of the B.D.O. Dharampur which referred to resolution No. 34 of the Gram Panchayat Gulhari vide which the water scheme was approved and implemented for village Than. There was other evidence also referring to this water supply scheme and the copies of the resolution of the Panchayat were also proved on record. There was also admission of the defendant as observed by the learned trial Court in paras 11 and 12 of the judgment that the water of Bouli in village Than dries up. The existence of the rubber pipe from the Bouli in question was also proved on record and the statements of the witnesses of the defendant was disbelieved that the water was never being used through pipe line from village Than, even though the defendant had admitted the existence of the pipe line from the water source. The defendant had himself admitted the existence of pipe line connected with the water source in the question at the spot as observed in para-15 of the judgment of the learned trial Court.

A perusal of the judgment of the learned first appellate Court shows that this evidence of the parties which have been discussed in detail by the learned trial Court was not properly appreciated by the learned first appellate Court which came to a different conclusion and gave its reasoning that there are several water sources which are being used by the plaintiffs. Reference was made to the statements of the plaintiffs who referred to the lift irrigation scheme provided by the Government and there was reference to the evidence also that the water of the Bouli dries up during summer season. It was held that there was no right of water by way of necessity. Reliance was not placed upon resolution of the Gram Panchayat, though it was observed in general that the copies of all the resolutions have not been placed on record, but it is clear from the observation made by the learned trial Court that the copies of the Resolutions of the Panchayat were duly proved on

record as Exts. PW4/A and PW4/B. Apart from the resolutions, there was evidence led from the office of the Block Department which referred to the water supply scheme sanctioned for taking water from this Bouli in question and it is not necessary that Khasra No. should have been mentioned in the copies of the resolution for which reason the evidence was disbelieved by the learned first appellate Court. There was ample evidence on record oral as well as documentary to prove that the scheme for taking of the water through pipe line was approved long back in 1964 for which the funds were provided to the Panchayat and the defendant should have protested at that time when the scheme was implemented, but once the scheme had been implemented for taking of the water in public interest for which funds were also provided by the Government, it does not lie in the mouth of he defendant now to claim that the plaintiffs or the State Government had no right for implementation of the water supply scheme through pipe line or use the water of the Bouli which in his exlusive ownership and possession. There is no plea of the defendant that by taking of the water from this water pipe by plaintiff and others, the water supply to him has been diminished. Once scheme had been implemented long back and no protests were proved to have been raised by the defendant, the reasonings given by the learned trial Court in allowing the claim of the plaintiffs was correct and the learned first appellate Court had disbelieved the evidence on the observations made which cannot be said to be correct. On the one hand the first appellate Court had observed that the copies of the resolution have not been placed on record as observed at page-10 but at page-11 in para 4, a reference was made to the resolutions but it was mentioned that there was no mention of the Khasra No. or that this is owned and possessed by the defendant. As mentioned above, these resolutions can be linked with the present scheme for the Bouli in question and the water pipe line taken

through the Bouli as duly established by the oral as well as documentary evidence led by the plaintiffs and the findings of the learned trial Court which were based on correct appreciation of law did not call for an interference by the learned first appellate Court. No person can claim exclusive right to use the water. A reference can be made to the Wajab-ul-Arj Ext.PW2/3/1 in which there is a reference to the Bouli and the water for which there is no interruption but nothing has been shown that the defendant had exclusive right to the water and no scheme could be implemented by the State Government and once the scheme has been implemented in the welfare of the people, it is not required that the said right of the plaintiffs to take water can be held was not there simply because the Bouli existed on the land owned and possessed by the defendant. Thus, the defendant had no right to interfere with the supply of drinking water under the scheme approved and executed by the Block Department through the Gram Panchayat long back and the findings recorded by the learned trial Court did not call for an interference by the learned first Appellate Court and as such, the findings of the learned first Appellate Court are set aside and the suit stand decreed as decreed by the learned trial Court. The appeal filed by the appellant is allowed accordingly. The parties are left to bear their own costs.

(V.K. Ahuja),
Judge

May 3, 2007
(BSS)